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DATO' SERI ANWAR IBRAHIM v. TAN SRI DATO' HJ MUHYIDDIN HJ MOHD YASSIN (THE PRIME MINISTER OF MALAYSIA) & ANOR AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
HAS ZANAH MEHAT JCA
B VAZEER ALAM MYDIN MEERA JCA
AHMAD ZAIDI IBRAHIM JCA
[CIVIL APPEAL NOS: W-01(A)-227-05-2021,
W-01(A)-145-03-2021 & J-01(IM)-226-05-2021]
12 JUNE 2023

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Abstract – *(i) Although the threshold for a leave application for judicial review is not a high one, the court must, in the first place, be clothed with jurisdiction to adjudicate the substantive matter that is proposed to be raised in the judicial review application before leave can* D *be granted; (ii) Under art. 150(6) and (8) of the Federal Constitution, Parliament has intended to exclude judicial review of the decisions to proclaim emergency and promulgate emergency laws, as well as shutting the doors of the court to any challenge of law made during the emergency and the proclamation of emergency by the Yang di-Pertuan Agong. The* E *whole integrity of the Federal Constitution will be undermined if the courts were to disregard the limitations imposed by Parliament (which represents the will of the people).*

F ***ADMINISTRATIVE LAW:*** *Judicial review – Refusal of – Refusal of leave applications – Appeal against – Application to challenge validity of proclamation of emergency to control and reduce COVID-19 cases issued under art. 150(1) of Federal Constitution – Whether court clothed with jurisdiction to adjudicate substantive matter raised in application – Whether substantive matters raised justiciable – Whether legislation enacted pursuant to proclamation of emergency* G *invalid on ground of inconsistency with any provisions of Federal Constitution – Whether court barred from questioning exercise of discretion by Yang di-Pertuan Agong on proclamation of emergency – Whether Parliament intended to exclude judicial review of decisions to proclaim emergency and promulgate emergency laws – Federal Constitution, art. 150(6) & (8) – Rules of Court 2012, O. 53*

H ***CONSTITUTIONAL LAW:*** *Federal Constitution – Proclamation of emergency – Proclamation of emergency issued under art. 150(1) of Federal Constitution – Constitutionality of – Whether Parliament intended to exclude judicial review of decisions to proclaim emergency and promulgate emergency laws – Whether legislation enacted pursuant to proclamation of emergency invalid on ground of* I *inconsistency with any provisions of Federal Constitution – Whether court barred from questioning exercise of discretion by Yang di-Pertuan Agong on Proclamation of Emergency – Federal Constitution, art. 150(6) & (8) – Rules of Court 2012, O.* 53

There were three appeals which emanated from the High Courts. The appellants in the said appeals were either Members of Parliament or the State Legislative Assembly. The appeals arose from the applications for leave to apply for judicial review under O. 53 of the Rules of Court 2012 ('ROC') to challenge the validity of the proclamation of emergency dated 11 January 2021 published in the Federal Government *Gazette* PU(A)7/2021 on 12 January 2021 ('proclamation of emergency') and the Emergency (Essential Powers) Ordinance 2021 published in the Federal Government *Gazette* PU(A) 21/2021 on 14 January 2021 ('Ordinance'). In an effort to curb the rising cases of COVID-19, a nationwide lockdown was imposed under the Prevention and Control of Infectious Diseases Act 1988 ('1988 Act'), known as the Movement Control Order ('MCO'), effective from 18 March 2020 to 31 March 2020 published as a Federal Government *Gazette* PU(A) 91/2020 on 18 March 2020 ('MCO Regulations'). Due to rising COVID-19 cases, the MCO period was extended and the MCO Regulations were amended from time to time. On 12 January 2021, two statements were released to the public on the issuance of a proclamation of emergency under art. 150(1) of the Federal Constitution ('Constitution') made a day earlier by the Yang di-Pertuan Agong ('YDPA') as follows: (i) media statement issued on behalf of Istana Negara; and (ii) speech text of the first respondent. The two statements were briefly said as follows (i) on 11 January 2021, the first respondent was granted an audience with the YDPA whereat the first respondent presented his advice/or the advice of the cabinet for the YDPA to issue a proclamation of emergency under art. 150(1) of the Constitution to control and reduce the COVID-19 cases in Malaysia; (ii) upon receipt of such advice, the YDPA believed that the spread of the COVID-19 pandemic had reached a critical stage and there was a need to issue a proclamation of emergency pursuant to art. 150(1) of the Constitution; and (iii) the YDPA issued a proclamation of emergency dated 11 January 2021, published in the Federal Government Gazette on 12 January 2021 as PU(A) 7/2021. In the proclamation of emergency, it was stated that the YDPA was satisfied that a grave emergency existed whereby the security, economic life and public order in Malaysia were threatened arising from the COVID-19 pandemic. The YDPA proclaimed that a grave emergency existed and that the proclamation of emergency shall extend throughout the Federation of Malaysia with effect from 11 January 2021 until 1 August 2021 under cl. (1) of art. 150 of the Constitution. Subsequently, the YDPA promulgated the Ordinance, gazetted and published in the Federal Government *Gazette* PU(A) 12/2021 on 14 January 2021 under cl. 2B of art. 150 on the premise that YDPA was satisfied that immediate action was required to guarantee and preserve the security, economic life and public order. The appellants filed applications for leave for judicial review, and amongst the reliefs sought were declarations that ss. 11, 14 and 15 of the Ordinance were invalid, null and void and

arts. 150(6) and 150(8) were unconstitutional. The High Courts dismissed the aforesaid applications. Hence, this appeal. The main grounds of appeal were, *inter alia* (i) the High Courts had failed to appreciate or to sufficiently appreciate that the threshold for the appellants to overcome in any leave application for judicial review was low. Furthermore, the appellants contended that the leave applications were not frivolous as they dealt with important points of law, in particular, art. 150 of the Constitution and the validity/constitutionality of ss. 11, 14 and 15 of the Ordinance; and (ii) the nub of the appeals was whether the High Courts were right to have come to a final decision that cls. (6) and (8) or art. 150 of the Constitution were constitutional and shut the court's doors from any challenge or application against the proclamation of emergency and the ordinances enacted and/or promulgated under art. 150 at the leave stage as opposed to the substantive stage.

Held (dismissing appeals)

Per Has Zanah Mehat JCA delivering the judgment of the court:

(1) Although the threshold for a leave application for judicial review is not a high one, the court must, in the first place, be clothed with jurisdiction to adjudicate the substantive matter that is proposed to be raised in the judicial review application before leave can be granted. At this juncture, two terms become extremely relevant: justiciability and jurisdiction. When any matter is non-justiciable, the court may refrain from deciding upon the matter. As for jurisdiction, it is trite that the nature and extent of the jurisdiction of the court depend on what the law provides. The jurisdiction of the courts can only be conferred by law, except for the question of inherent powers. (paras 24 -30)

(2) The answer to the question as to whether the court can exercise its power to examine the substantive matter raised in the judicial review application when the court has no jurisdiction in respect of that matter must be in the negative. The court must first be clothed with the jurisdiction to entertain the judicial review application. In respect of all the three appeals herein, the court was not clothed with jurisdiction to adjudicate upon and grant the reliefs sought. The High Courts found that the substantive matters raised in the judicial review applications were not justiciable. This court agreed with the finding. (para 31)

(3) Under cls. (6) and (8) of art. 150 of the Constitution, Parliament intended to exclude judicial review of the decisions to proclaim emergency and promulgate emergency laws, as well as shutting the doors of the court to any challenge of law made during the emergency and the proclamation of emergency by the YDPA. This was the primary effect in law of cl. (8) that was inserted by the Constitution (Amendment) Act 1981. The High Courts herein were right to hold that cl. (8) of art. 150

which has the effect of ousting the jurisdiction of the court was not unconstitutional. The wording of cl. (8) was very clear, in that, it expresses the very intent of Legislature, which insulates the whole process from judicial scrutiny 'in any form' and 'on any ground'. The insertion of cl. (8) to art. 150 by the Constitution (Amendment) Act 1981 was valid and enforceable as the amendment was made under art. 159 cl. 1 of the Constitution after having complied with the process that was laid down in cl. 3 of the said article. The Constitution is the supreme law of the Federation, and the court is bound by its clear and express provisions. (paras 33-37)

(4) The whole integrity of the Federal Constitution would be undermined if the courts were to disregard the limitations imposed by Parliament (which represents the will of the people). In the upshot, cl. 6 of art. 150 of the Constitution provides in clear terms that no legislation enacted pursuant to a proclamation of emergency shall be invalid on the ground of inconsistency with any provisions of the Constitution. Meanwhile, cl. (8) of art. 150 prohibits any challenge to be made against the emergency proclamation and the emergency ordinances proclaimed by the YDPA. Thus, the court was not clothed with the jurisdiction as the subject matter was not amenable to judicial review. The court was barred by cl. (8) of art. 150 from questioning the exercise of discretion by the YDPA under cl. (1) of art. 150 on the proclamation of emergency. The substantive matters raised in all three proposed judicial review applications were non-justiciable and the courts did not have jurisdiction to adjudicate the same. The judges of the respective High Courts had committed no error in refusing the leave applications for judicial review. (paras 40-42)

Case(s) referred to:

Dato Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2010] 7 CLJ 397 FC ***(refd)***
Letitia Bosman v. PP & Other Appeals [2020] 8 CLJ 147 FC ***(refd)***
Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 2 CLJ 579 FC ***(refd)***
Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal [2019] 4 CLJ 561 FC ***(refd)***
Phang Chin Hock v. PP [1979] 1 LNS 67 FC ***(refd)***
PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:

Emergency (Essential Powers) Ordinance 2021, ss. 11(a), 14, 15
Federal Constitution, arts. 150(1), (6), (8), 159(1), (3)
Rules of Court 2012, O. 53
Specific Relief Act 1950, s. 44

A *(Civil Appeal No: W-01(A)-227-05-2021)*
For the appellant - Ramkarpal Singh, Sangeet Kaur Deo, Harshaan Zamani & Simranjit Kaur Chhran; M/s Karpal Singh & Co
For the respondents - Suzana Atan, Narkunavathy Sundareson, SFCs & Mohammad Sallehuddin Md Ali; FC, AG Chambers

B *(Civil Appeal No: W-01(A)-145-03-2021)*
For the 1st, 2nd & 3rd appellants - Dr Gurdial Singh Nijar, Christopher Leong Sau Foo, Razlan Hadri Zulkifli, Abdullah Abdul Rahman, Abraham Au, Muhammad Hiqmar Danial Hidzir, Nirvan Gopalan Khrishnan, Danny Soong Ming, Andrew Khoo & Siti Nura; M/s Chooi & Company + Cheang & Ariff
For the respondents - Suzana Atan, Narkunavathy Sundareson, SFCs & Mohammad
C *Sallehuddin Md Ali; FC, AG Chambers*

(Civil Appeal No: J-01(IM)-226-05-2021)
For the appellant - Dr Gurdial Singh Nijar, Christopher Leong Sau Foo, Razlan Hadri Zulkifli, Abdullah Abdul Rahman, Abraham Au, Muhammad Hiqmar Danial Hidzir, Nirvan Gopalan Khrishnan, Danny Soong Ming, Andrew Khoo & Siti Nura; M/s Chooi & Company + Cheang & Ariff)
D *For the respondents - Suzana Atan, Narkunavathy Sundareson, SFCs & Mohammad Sallehuddin Md Ali; FC, AG Chambers*

Reported by Suhainah Wahiduddin

JUDGMENT

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Has Zanah Mehat JCA:

Introduction

[1] Three appeals before us emanated from the High Courts in Kuala Lumpur and Johor Bahru. They are as follows:

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(i) *Dato' Seri Anwar bin Ibrahim v. Tan Sri Dato' Hj Muhyiddin bin Haji Mohd Yassin (The Prime Minister of Malaysia) & Anor* (W-01(A)-227-05-2021), a decision by Mariana Yahya J at High Court of Kuala Lumpur ('DSAI's appeal');

G (ii) *Datuk Seri Salahuddin bin Ayub & Ors v. Perdana Menteri, Tan Sri Dato' Hj Mahiaddin bin Md Yasin & Anor* (W-01(A)-145-03-2021), a decision by Ahmad Kamal Md Shahid J at High Court of Kuala Lumpur ('DSSA's appeal'); and

H (iii) *Hassan bin Abdul Karim v. Perdana Menteri, Tan Sri Dato' Hj Mahiaddin bin Md Yasin & Anor* (J-01 (IM)-226-05-2021); a decision by Evrol Mariette Peters JC at High Court of Johor Bahru ('HAK's appeal').

[2] For this judgment, we will refer to the three appeals as "the appeals" unless otherwise stated. We have considered the appeals based on their pleaded prayers in the respective applications at the High Court.

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[3] DSSA's appeal and HAK's appeal were heard together on 18 August 2012 and were adjourned for a decision on 30 September 2021. Subsequently, the DSAI's appeal was fixed for hearing before us on 28 September 2021. After hearing both parties in DSAI's appeal, we found that the main issues in the appeals were identical. To save judicial time, we delivered our decision on the appeals together on the same day.

[4] The appellants in the appeals are either members of Parliament or the state legislative assembly.

[5] The appeals arose from the applications for leave to apply for judicial review under O. 53 of the Rules of Court 2012 ('ROC') to challenge the validity of the proclamation of emergency dated 11 January 2021 published in the Federal Government Gazette PU(A) 7/2021 on 12 January 2021 ('proclamation of emergency') and the Emergency (Essential Powers) Ordinance 2021 published in the Federal Government Gazette PU(A) 12/2021 on 14 January 2021 ('Ordinance').

[6] All three High Courts dismissed the aforesaid applications. Aggrieved by the decisions of the High Courts, the appellants appealed to this court.

Background Facts

[7] We adopt the background facts as stated by the High Courts with modifications where necessary. In an effort to curb the rising cases of COVID-19, a nationwide lockdown was imposed under the Prevention and Control of Infectious Diseases Act 1988 ('1988 Act'), known as the Movement Control Order ('MCO'), effective from 18 March 2020 to 31 March 2020, published as a Federal Government Gazette PU(A) 91/2020 on 18 March 2020 ('MCO Regulations').

[8] Due to rising COVID-19 cases, the MCO period was extended and the MCO Regulations were amended from time to time.

[9] The Government also declared stricter lockdown, known as the Enhanced Movement Control Order ('EMCO'), in specific places where clusters of COVID-19 cases existed, according to the provisions under the 1988 Act. Despites various steps taken by the government at that material time, the COVID-19 infection continued to rise.

[10] On 12 January 2021, two statements were released to the public on the issuance of a proclamation of emergency under art. 150(1) of the Constitution made a day earlier by the Yang di-Pertuan Agong ("YDPA"), as follows:

A (i) media statement issued on behalf of Istana Negara; and

(ii) speech text of the first respondent.

[11] The two statements are briefly said as follows:

B (i) on 11 January 2021, the first respondent was granted an audience with the YDPA whereat the first respondent presented his advice and/or the advice of the cabinet for the YDPA to issue a proclamation of emergency under art. 150(1) of the Constitution to control and reduce the COVID-19 cases in Malaysia;

C (ii) upon receipt of such advice, the YDPA believed that the spread of the COVID-19 pandemic had reached a critical stage, and there was a need to issue a proclamation of emergency pursuant to art. 150(1) of the Constitution; and

(iii) the YDPA issued a proclamation of emergency dated 11 January 2021, D published in the Federal Government Gazette on 12 January 2021 as PU(A) 7/2021.

[12] In the speech text of the first respondent, as mentioned in the High Court judgment of DSAI's appeal, the reasons cited by the first respondent as the basis of his advice to the YDPA were, *inter alia*, as follows:

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> 5. In this regard, as a whole world is currently facing the threat of the COVID-19 pandemic, which has directly become a major threat to the economic life of the people in this country, a declaration of emergency can be made by His Majesty the King, the Yang di-Pertuan Agong. Apart from the sharp increase in positive COVID-19 cases, there are several states in F Malaysia, such as Johor, Pahang and Kelantan currently experiencing heavy flooding, directly posing major threats to the safety and economic life of the people.
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> 6. As I explained when announcing the implementation of the Movement Control Order yesterday, COVID-19 infection cases are on the rise and show no sign of decline in the near future. Therefore, the Government G needs to have certain powers to ensure that this pandemic can be curbed more effectively and the health services provided to the people are not crippled.

[13] In the proclamation of emergency, it is stated that the YDPA has satisfied that a grave emergency existed whereby the security, economic life H and public order in Malaysia were threatened arising from the COVID-19 pandemic. The YDPA proclaimed that a grave emergency existed and that the Proclamation of Emergency shall extend throughout the Federation of Malaysia with effect from 11 January 2021 until 1 August 2021 under cl. (1) of art. 150 of the Constitution. Clause (1) of art. 150 provides that:

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(1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.

[14] Subsequently, the YDPA promulgated the Ordinance, gazetted and published in the Federal Government Gazette PU(A) 12/2021 on 14 January 2021, under cl. 2B of art. 150 on the premise that YDPA was satisfied that immediate action was required to guarantee and preserve the security, economic life and public order. Clause 2B provides that:

(2B) If at any time while a Proclamation of Emergency is in operation, except when both Houses of Parliament are sitting concurrently, the Yang di-Pertuan Agong is satisfied that certain circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as circumstances appear to him to require.

[15] Sections 14 and 15 of the Ordinance provide as follows:

14. Parliament sitting

(1) For so long as the emergency is in force:

(a) the provisions relating to the summoning, proroguing and dissolution of Parliament in the Federal Constitution shall not have effect; and

(b) the Parliament shall be summoned, prorogued and dissolved on a date as the Yang di-Pertuan Agong thinks appropriate.

(2) Any meeting of the Parliament which has been summoned before the coming into operation of this Ordinance but has not been held is cancelled.

15. Sitting of State Legislative Assembly

(1) For so long as the emergency is in force:

(a) the provisions relating to the summoning, proroguing and dissolution of a State Legislative Assembly in the Eighth Schedule to the Federal Constitution, Constitution of any State and any State law shall not have effect; and

(b) a State Legislative Assembly shall be summoned, prorogued and dissolved on a date as the Yang di-Pertuan Agong thinks appropriate after consultation with the respective Ruler or the Yang di-Pertua Negeri.

(2) Any meeting of a State Legislative Assembly which has been summoned before the coming into operation of this Ordinance but has not been held is cancelled.

[16] Section 11 (a) of the Ordinance provides that:

A 11. Executive and legislative powers

For so long as the emergency is in force:

(a) the Prime Minister and the Cabinet existing immediately prior to the issuance of the Proclamation of Emergency on 11 January 2021 who have been conferred the executive functions shall
B continue to exercise the executive authority of the Federation and such other persons who have been conferred the executive functions by law shall continue to exercise such functions;

(b) the Menteri Besar or Chief Minister and the State Executive Council or State Cabinet of the respective States existing
C immediately prior to the issuance of the Proclamation of Emergency on 11 January 2021 who have been conferred the executive functions shall continue to exercise the executive authority of the States and such other persons who have been conferred the executive functions by law shall continue to exercise such functions; and

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(c) the legislative functions to make subsidiary legislation under Federal laws and State laws shall continue to be exercised by the persons so authorized by such laws.

The Reliefs Sought

E **[17]** Premised upon the abovementioned facts, the appellants in the appeals filed application for leave for judicial review. Amongst the reliefs sought are for declarations that:

(i) sections 11, 14 and 15 of the Ordinance are unconstitutional and therefore invalid, null and void; and

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(iii) articles 150(6) and 150(8) of the Constitution are unconstitutional.

[18] In DSAI's appeal, the appellant, among others, sought a court declaration that the decision by the cabinet of Ministers ('cabinet'), led by the first respondent, to advice the YDPA to promulgate s. 14 of the
G Ordinance, which resulted in the suspension of Parliament, was unconstitutional, unlawful, had no effect and was *ultra vires*.

Grounds Of Appeal

[19] Based on the appellants' memorandum of appeals, the main grounds
H of appeal can be summarised as follows:

(i) the High Courts failed to appreciate or to sufficiently appreciate that the threshold for the appellants to overcome in any leave application for judicial review is low. Furthermore, the appellants contend that the leave applications are not frivolous as they dealt with important points
I of law, in particular, art. 150 of the Constitution and the validity/ constitutionality of ss. 11, 14 and 15 of the Ordinance;

(ii) the nub of the appeals is whether the High Courts were right to have come to a final decision that cl. (6) and (8) of art. 150 of the Constitution are constitutional and shut the court's doors from any challenge or application against the proclamation of emergency and the ordinances enacted and/or promulgated under art. 150 at the leave stage as opposed to the substantive stage;

(iii) whether the decision by the cabinet, led by the first respondent, to advice the YDPA to promulgate s. 14 of the Ordinance, which resulted in the suspension of Parliament, was unconstitutional, unlawful, had no effect and was *ultra vires* as raised in DSAI's appeal; and

(iv) whether the High Court was right to hold that the leave application for an order of *mandamus* did not comply with the requirements of s. 44 of the Specific Relief Act 1950 ('SRA'), namely, that there was no compliance with the requirements that the appellants must have a clear, specific and well defined legal right to the relief sought, that there must be a duty imposed by law on the respondents to carry out the act required under the *mandamu*s sought and the order should not bind the YDPA as raised in DSAI's appeal.

Our Decision

[20] For this judgment, we will only focus on grounds (i) and (ii) above, which are the main issues in the appeals and on which the appeals can be finally disposed.

[21] The application for judicial review is governed under O. 53 of the ROC which consists of a two-fold process: the leave stage and the substantive hearing. Leave may be granted when the application filed is not frivolous or vexatious and meets the requirement of being an arguable case in favour of granting the reliefs sought for it to be allowed to continue to a substantive hearing (*WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 296).

[22] In the three appeals, it was submitted that the appellants had met the threshold. The gist of the appellants' argument is that the High Court should have allowed the appellants to raise the challenge against the Ordinance because the court does not have to deal with the merits at the leave stage. Furthermore, appellants contended that the grounds of reliefs applied for demonstrated that these were not frivolous cases.

[23] In conclusion, the appellants submitted that the applications are not frivolous and leave should not be denied, given the low threshold. If the decision of the respective High Courts is allowed to stand, it will:

(i) deny the judiciary the opportunity to a mature and proper consideration of the provisions of the Constitution;

A (ii) establish a law to be at variance with the doctrine of basic structure; and

(iii) render the role of the judiciary "illusory and nugatory," whereby the appellants will be denied access to justice.

[24] At the outset, it bears emphasis that although the threshold for the B leave application for judicial review is not a high one, the court must, in the first place, be clothed with the jurisdiction to adjudicate the substantive matter that is proposed to be raised in the judicial review application before leave can be granted. At this juncture, two terms become extremely relevant: justiciability and jurisdiction.

C **Justiciability**

[25] The issue of justiciability arises when the power of the court to determine some matter is questioned. Justiciability was defined and analysed in great detail by the Federal Court in the case of *Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal* [2019] 4 CLJ 561; [2019] 3 MLJ 443 D ('*Chin Chee Kow*'). as follows:

> *It is trite that not all cases brought before courts are reviewable. Before proceeding to hear a case, a court must first examine, inter alia, its justiciability.* "Justiciability" concerns the limits upon legal issues over which a court can exercise its judicial authority. *Non-justiciability* in its administrative law sense *signifies* E *that a matter is not capable of or susceptible to, judicial review, as well as non-justiciability in the sense of there being no jurisdiction to entertain an issue or to grant approved relief.* (emphasis added)

[26] A good definition of 'justiciability' can also be found in Chris Finn's *"The Concept of 'Justiciability' in Administrative Law"* in Groves & Lee, F Australian Administrative Law (2007) which state as follows:

> *The term "justiciability" refers to the suitability for, or amenability to, judicial review of a particular administrative decision or class of decisions.* The term derives from the common law and reflects a series of self-imposed judicial restraints, themselves founded in a view as to the appropriate constitutional balance G between the respective roles of the executive and the judiciary. *Thus, a matter may be deemed 'non- justiciable' by a Court which feels that its resolution either is beyond the institutional competence of the Court or would involve stepping outside its appropriate constitutional role.* (at p. 143). (emphasis added)

[27] From the authorities cited above, generally, some matters are H non-justiciable. When any matter is non-justiciable, the court may refrain from deciding upon the matter.

Jurisdiction Of The Courts

[28] It is trite that the jurisdiction of the courts is conferred upon by a law. Abdul Hamid Mohamad PCA (as he then was) in *PP v. Kok Wah Kuan* [2007] I 6 CLJ 341; [2008] 1 MLJ 1, where His Lordship made the following pertinent observations:

> [21] ... *The extent of the powers of the courts depends on what is provided in the Constitution.* In the case of the two High Courts, they 'shall have such jurisdiction and powers as may be conferred by or under federal law.' So, we will have to look at the federal law to know the jurisdiction and powers of the courts. (In the case of the Federal Court and the Court of Appeal, part of their jurisdiction is specifically provided in the Constitution itself – see art. 121(1B) and (2) respectively).
>
> [22] So, *even if we say that judicial power still vests in the courts, in law, the nature and extent of the power depends on what the Constitution provides, not what some political thinkers think 'judicial power' is.* Federal law provides that the sentence of death shall not be pronounced or recorded against a person who was a child at the time of the commission of the offence. *That is the limit of judicial power of the court imposed by law.* It further provides that, instead, the child shall be ordered to be detained in a prison during the pleasure of the Yang di-Pertuan Agong or the Ruler or the Yang Di-Pertua Negeri, depending on where the offence was committed. That is the sentencing power given by federal Law to the court as provided by the Constitution. Similarly, in some cases, federal law provides for death sentence, in others, imprisonment and/or fine, some are mandatory and some are discretionary. The Legislature provides the sentences, the court imposes it where appropriate. (emphasis added)

[29] Hence, it is trite that the nature and extent of the jurisdiction of the court depend on what the law provides. This principle was affirmed and elucidated in a string of Federal Court decisions, including *inter alia Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147; [2020] 5 MLJ 277, and *Dato' Seri Anwar Ibrahim v. PP* [2010] 7 CLJ 397; [2010] 5 MLJ 145.

[30] Therefore, it is clear that the jurisdiction of the courts can only be conferred by law except for the question of inherent powers.

[31] Hence, based on the above authorities, the answer to the question as to whether the court can exercise its power to examine the substantive matter raised in the judicial review application when the court has no jurisdiction in respect of that matter, must be in the negative. The court must first be clothed with the jurisdiction to entertain the judicial review application. In respect of all three appeals, the High Courts were of the view that the court is not clothed with jurisdiction to adjudicate upon and grant the reliefs sought. In short, they found the substantive matters raised in the judicial review applications were not justiciable. We agree with that finding for the following reasons.

Articles 150(6) And 150(8) Of The Constitution

[32] The essence of the subject matter in all the judicial review applications, which is the subject matter of these appeals, is the proclamation of emergency and the Ordinance. Hence, the next pivotal question is whether the court has jurisdiction to inquire into the validity or constitutionality of the proclamation of emergency and Ordinance?

[33] We agree with the decisions of the High Courts that under cl. (6) and (8) of art. 150 of the Constitution, Parliament intended to exclude judicial review of the decisions to proclaim emergency and promulgate emergency laws, as well as shutting the doors of the court to any challenge of law made during the emergency and the proclamation of emergency by YDPA. This is the primary effect in law of cl. (8) that was inserted by the Constitution (Amendment) Act 1981.

[34] The three learned judges of the High Courts are right to hold that cl. (8) of art. 150, which has the effect of ousting the jurisdiction of the court is not unconstitutional. The clear wordings of cls. (6) and (8)(a) and (b) are as follows:

> (6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.
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> (7) ...
>
> (8) Notwithstanding anything in this Constitution:
>
> (a) the satisfaction of the Yang di-Pertuan Agong mentioned in Clause (1) and Clause (2B) **shall be final and conclusive and shall not be challenged or called in question in any court on any ground;** and
>
> (b) **no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of:**
>
> (i) a Proclamation under Clause (1) or of a declaration made in such Proclamation to the effect stated in Clause (1);
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> (ii) the continued operation of such Proclamation;
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> (iii) any ordinance promulgated under Clause (2B); or
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> (iv) the continuation in force of any such ordinance.
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> (emphasis added)

[35] The wording of cl. (8) is very clear, in that it expresses the very intent of the legislature, which insulates the whole process from judicial scrutiny "in any form" and "on any ground".

[36] The insertion of cl. (8) to art. 150 by the Constitution (Amendment) Act 1981 is valid and enforceable as the amendment was made under art. 159 cl. (1) of the Constitution after having complied with the process that is laid down in cl. (3) of the said article. The dear wordings of art. 159 are as follows:

(1) Subject to the following provisions of this Article and to Article 161E, **the provisions of this Constitution may be amended by federal law.**

(2) (Repealed).

(3) **A Bill for making any amendment to the Constitution** (other than an amendment excepted from the provisions of this Clause) and a Bill for making any amendment to a law passed under Clause (4) of Article 10 **shall not be passed** in either House of Parliament **unless it has been supported** on Second and Third Readings **by the votes of not less than two-thirds of the total number of members of that House.**

(4) The following amendments are excepted from the provisions of Clause (3), that is to say:

(a) any amendment to Part III of the Second or to the Sixth or Seventh Schedule;

(b) any amendment incidental to or consequential on the exercise of any power to make law conferred on Parliament by any provision of this Constitution other than Articles 74 and 76;

(bb) subject to Article 161E any amendment made for or in connection with the admission of any State to the Federation or its association with the States thereof, or any modification made as to the application of this Constitution to a State previously so admitted or associated;

(c) any amendment consequential on an amendment made under paragraph (a).

(5) A law making an amendment to Clause (4) of Article 10, any law passed thereunder, the provisions of Part Ili, Article 38, Clause (4) of Article 63, Article 70, Clause (1) of Article 71, Clause (4) of Article 72, Article 152, or 153 or to this Clause shall not be passed without the consent of the Conference of Rulers.

(6) In this Article **"amendment"** includes addition and repeal; and in this Article and in paragraph (a) of Article 2 "State" includes any territory.

(emphasis added)

[37] It was not disputed that the amendment was passed by the required votes of not less than two-thirds number of the members of Parliament. The Constitution is the supreme law of the Federation, and the court is bound by its dear and express provisions.

[38] Further, on the validity of the Constitution (Amendment) Act 1981, we are also bound by the earlier decision of the Federal court where Suffian LP said in *Phang Chin Hock v. PP* [1979] 1 LNS 67; [1980] 1 MLJ 70 at p. 72:

A In our judgement, in construing art. 4(1) and art. 159, the rule of harmonious construction requires us to give effect to both provisions and to hold and **we accordingly hold that Acts made by Parliament, complying with the conditions set out in art. 159, are valid** even if inconsistent with the Constitution, and that a distinction should be drawn between on the one hand Acts effecting the Constitution and on the B other hand ordinary laws enacted in the ordinary way. It is federal law of the latter category that is meant by law in **art. 4(1)**; only such law must be consistent with the Constitution. (emphasis added)

[39] On the effect of the ouster clause provisions in the legislation, based on the judicial precedents, we are bound based on the doctrine of *stare decisis* C by the earlier decisions of the Federal Court, amongst others, namely the case of *Dato' Seri Anwar Ibrahim v. PP* [2002] 3 CLJ 457; [2002] 3 MLJ 193, which stated that no challenge could be made to the continued operation of an ordinance made under art. 150 of the Constitution. Haidar Mohd Noor FCJ (as he then was) stated the following:

D ... Here we are dealing with the law that was promulgated under special provisions of Part XI of the Constitution, which is, art. 150 (the proclamation of emergency). It should be noted that there is the overriding provision in cl. (8)(b) of art. 150 itself that "notwithstanding anything in this Constitution" *the court shall have no jurisdiction to entertain* E *or determine any application in whatever form, on any ground, regarding the validity of, inter alia, the continuation in force of the Ordinance.* It may be argued such a constitutional provision would amount to "closing the doors of the court" and is therefore harsh and unjust. Our answer is that this issue should be addressed to the legislature and not the courts by those who disagree with such a provision and they have their remedy at the ballot F box (*Lok Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187 at p. 188). (emphasis added)

[40] In the recent decision of the Federal Court, it was again emphasised in the majority decision of *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579 at para. 174 of the judgment of Abdul Rahman Sebli G FCJ, which states that the whole integrity of the Federal Constitution will be undermined if the courts were to disregard the limitations imposed by Parliament (which represents the will of the people).

[41] In the upshot, cl. 6 of art. 150 of the Constitution provides in clear terms that no legislation enacted pursuant to a proclamation of emergency H shall be invalid on the ground of inconsistency with any provisions of the Constitution. Meanwhile, cl. (8) of art. 150 prohibits any challenge to be made against the emergency proclamation and the emergency ordinances proclaimed by the YDPA.

I

[42] In conclusion, based on the foregoing paragraphs, the court is not clothed with jurisdiction as the subject matter is not amenable to judicial review. Now, even if leave were to be granted on the basis of lower threshold as argued by the appellants, it would be an exercise in futility as the court is barred by cl. (8) of art. 150 from questioning the exercise of discretion by the YDPA under cl. (1) of art. 150 on the proclamation of emergency. In this regard, we agree with the High Courts that the substantive matters raised in all three proposed judicial review applications are non-justiciable and the courts do not have jurisdiction to adjudicate the same. Thus, we find that the three learned judges of the respective High Courts have committed no error in refusing the leave applications for judicial review. We, therefore, dismissed the three appeals, and the decisions of the High Courts are affirmed, with no order as to costs.